FOR ARGUMENT

No. 90-6282

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DANIEL TOUBY and LYRISSA TOUBY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONERS

DANIEL L. MEYERS
351 Broadway
Second Floor
New York, New York 10013
(212) 226-4106

MICHAEL E. DEUTSCH
PEOPLE'S LAW OFFICE
1180 North Milwaukee
Chicago, Illinois 60622
(312) 235-0070

JOEL I. KLEIN *
RICHARD G. TARANTO
ROBERT H. TILLER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184
Counsel for Petitioners

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

Statutes

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-6282

DANIEL TOUBY and LYRISSA TOUBY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONERS

We argued in our opening brief that the temporary scheduling statute (21 U.S.C. § 811(h)) is constitutionally infirm because it aggregates non-reviewable criminal law powers in the Attorney General. Specifically, we claimed that (1) the unique combination of crime-defining and crime-enforcing powers in a single official and (2) the prohibition of judicial review of that official's crime-defining decisions are each impermissible and that, in any event, the existence of both in a single statute violates separation-of-powers requirements. We further argued that, given the remarkable nature of this aggregation of

power, the Attorney General was not permitted to subdelegate it without clear congressional authorization, which the statute does not contain.

The government's response does not come to grips with those arguments. In particular, the government totally ignores our claim that the aggregation of crime-defining and -enforcing powers *coupled with* the elimination of judicial review effects a unique and intolerable dismantling of traditional checks and balances on governmental power over personal liberty. Even when addressing each of our challenges separately, moreover, the government's brief largely misses the mark. Thus, it first argues at length that section 811(h) provides a sufficient "intelligible principle" within the meaning of this Court's delegation cases (Resp. Br. 19-25), even though we do not dispute that point. And the government responds to our judicial review claim by rewriting the statute twice—initially by mischaracterizing the temporary scheduling process as simply a preliminary step in the permanent scheduling process, and then by ignoring the plain meaning of the words "not subject to judicial review."

Most remarkably, the government is unable to cite any real precedent, either in case law or in actual practices sanctioned by Congress, for section 811(h)'s violation of either of the two structural principles that we rely on, much less for its violation of both. Instead, as to the combining of crime-defining and prosecutorial powers, the government rests chiefly on a formalistic approach to the separation-of-powers doctrine—an approach that simply disregards the reality of the entirely novel concentration of power effected by section 811(h). And as to the preclusion of judicial review, the government merely asserts that there is no reason for concern if a crime-defining executive regulation is allowed to remain in effect for eighteen months, without any pre-prosecution opportunity to test whether it conforms with the intelligible principle that legitimates the congressional delegation in the first

place. In neither instance, moreover, does the government come forward with any convincing argument from practical necessity to explain why relaxation of the ordinary structural protections of the Constitution might be justified here. Lastly, again ignoring the realities of this unique aggregation of power, the government woodenly argues that two general delegation statutes, passed long before the Attorney General had any power like that conferred by section 811(h), should be read to allow the Attorney General to subdelegate this crime-defining power to anyone of his choosing in the Justice Department.

ARGUMENT

1. *The Constitutional Infirmities in Section 811(h) are Cumulative, Not Separate.* Petitioners' primary challenge to section 811(h) is that it permits "the accumulation of excessive authority" (*Mistretta v. United States*, 109 S. Ct. 647, 659 (1989)) in the Attorney General. That official, by congressional determination, is solely responsible for prosecuting essentially all crimes against the United States. *See* Pet. Br. 19 n.13. Pursuant to section 811(h), he is then given the additional discretion to select particular drugs, under broad standards, and make them criminal for a period of eighteen months. During that time, the criminal proscription announced by the Attorney General is immune from judicial review, so that there can be no determination as to whether he acted within the substantive standards established by Congress. At most, according to the government, but contrary to the language of the statute, once someone is indicted, he may then raise a judicial challenge to the temporary scheduling decision.

That is a vast amount of power, directly affecting individual liberties, to repose in one official. It permits that official, all by himself, effectively to prevent the manufacture, distribution, sale, or possession of a drug for a year and a half. It also permits him to bring down

the government's full prosecutorial powers on any individual who violates his non-reviewable, crime-defining decision. Our objection to this process is not, as the government would have it, "that particular officials with the Executive Branch cannot be trusted to execute faithfully Congress's directives." Resp. Br. 29. It is, instead, that our system of checks and balances was expressly designed to provide citizens with structural protections precisely so that case-by-case inquiries into abuse are unnecessary.

Rather than address our argument concerning the cumulative aggregation of unchecked powers that section 811(h) effects, the government attempts to isolate each of the separate statutory infirmities and argue that it, standing alone, survives constitutional attack. Although the government's task is thus made easier, its arguments are nevertheless flawed. As we now show, each of the infirmities in section 811(h), by itself, violates separation-of-powers principles.

2. *Combining the Prosecutorial and Crime-Defining Power Is Impermissible.* The government's principal defense of the concentration of crime-defining and crime-prosecuting power in a single executive officer is flatly to deny that any assignment of powers within the Executive Branch can have constitutional significance. Resp. Br. 25-28. This argument rests on precisely the kind of formalistic approach to separation-of-powers questions that this Court has repeatedly rejected. *See, e.g., Mistretta v. United States*; *Morrison v. Olson*, 487 U.S. 654 (1988). Those cases, following *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 442 (1977), have taken a "pragmatic, flexible approach" to separation-of-powers questions, focusing on whether a particular practice meaningfully usurps another Branch's functions or leads to an excessive aggregation of power within a Branch.

There is no reason to regard this functionalist approach as a one-way street. Just as a congressional assignment of powers can be *validated* when it is found *not* to aggregate too much power, so too should a congressional assignment of powers be *invalidated* when it is found to aggregate too much power. That is precisely what section 811(h) does—not because Congress has somehow "gone too far," but for the more concrete and compelling reason that, because criminal law is distinctive, the power to make otherwise lawful conduct of private citizens into a crime generally may not be given to the same officer who holds the prosecutorial power.[1]

The government is incorrect in arguing that the Constitution imposes no constraints on the assignment of functions within the Executive Branch (Resp. Br. 27). Thus, the Due Process Clause forbids a parole officer who "prosecutes" a parole violation to sit simultaneously as the "judge" of the violation: a different decisionmaker is required because combining the functions of prosecutor and adjudicator undermines the fundamental requirement of separated functions. *Gagnon v. Scarpelli*, 411 U.S. 778, 785-86 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972).[2] Essentially the same constitutional concept of

---

[1] Contrary to the government's argument (Resp. Br. 29-30), the *statute* cannot be saved from structural invalidation by the Attorney General's action of giving away the power that Congress has assigned to him. If the statute is invalid, there is no power to subdelegate. Moreover, even aside from the questionable subdelegation here, nothing prevents the Attorney General from revoking the subdelegation at will.

[2] In *Withrow v. Larkin*, 421 U.S. 35 (1975), the Court held that no due process violation was inherent in a state medical examining board's adjudication of disciplinary charges that it had itself investigated and brought based on a probable cause determination. The Court carefully distinguished not only *Gagnon* and *Morrissey* but also other cases that involved a combination of criminal prosecutorial and adjudicatory functions, such as *In re Murchison*, 349 U.S. 133 (1955), and *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). *See Withrow*, 421 U.S. at 53-54, 58.

We note, too, that the Constitution may prohibit the same judges, within the Judicial Branch, from performing certain combinations of functions—such as the appointment of independent counsels and

separated functions in the process of depriving an individual of liberty is reflected in the separation-of-powers principle.[3] If the Constitution generally precludes the combination of prosecutorial and adjudicatory functions in a single executive officer when personal liberty is at stake, it should likewise generally preclude the combination of the lawmaking and prosecutorial power in the same executive officer when personal liberty is at stake. The absence of case law so holding reflects nothing more than the fact—itself of great significance—that what Congress has done in this case is unprecedented.

Although the government seeks to demonstrate that the combination of crime-defining and crime-prosecuting power is not wholly unprecedented, its failure to find more than a single example as well as the nature of that example only confirm the deep historical recognition that this combination of powers represents an excessive aggregation.[4] The government's only example—a statute au-

---

the adjudication of cases brought by such independent counsels. *Cf. Morrison v. Olson*, 487 U.S. 654, 683-84 (1988) (stressing statutory requirement of such separation within Judicial Branch in rejecting challenge to independent counsel statute).

[3] Indeed, "due process" takes its core meaning from the accepted processes of law by which individual liberty (or life or property) can be affected, thus incorporating into the Due Process Clause the accepted structural separation of powers in the government. *See Pacific Mut. Life Ins. Co. v. Haslip*, 59 U.S.L.W. 4157, 4164-65 (U.S. Mar. 4, 1991) (Scalia, J., concurring); *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (plurality opinion).

[4] The permanent scheduling authority, relied on by the government (Resp. Br. 31), is different because the Secretary of HHS has absolute veto power over a scheduling decision. And, as for the INS statute cited by the government (Resp. Br. 32 n.27), there is nothing in that omnibus provision or the government's brief to indicate that Congress ever contemplated that the Attorney General would establish criminal rules affecting the entry of aliens; nor is there any suggestion that the Attorney General has ever attempted to do so.

thorizing the Attorney General to define contraband that may not be introduced into prison—is obviously quite different from the present case.[5] First, the actions of prisoners, whose liberty is substantially restricted to begin with, and the relations of other persons to prisoners, are generally subject to diminished constitutional protections. *See, e.g., Thornburgh v. Abbott*, 109 S. Ct. 1874, 1878 (1989); *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). The Constitution's structural protections of liberty may accordingly be relaxed in the prison setting. Second, very different practical considerations support giving the Attorney General authority to criminalize activities at prisons, which *he* is charged with managing and controlling, than would support giving him identical power over citizens for whom he has no custodial responsibility. *Cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).[6] Finally, it is notable that, even in the special circumstances of prison regulation, Congress did not eliminate judicial review, as it has done in section 811(h). *See* 18 U.S.C. § 4001; *Daugherty v. Harris*, 476 F.2d 292 (10th Cir.), *cert. denied*, 414 U.S. 872 (1973). The structural flaw in the present statute, in short, remains unprecedented.

3. *Judicial Review Is Required.* The government's primary defense of section 811(h)(6)'s preclusion of

---

[5] None of the cases upholding this prison-regulation authority (*see* Resp. Br. 31 n.26) addresses the particular challenge we make here.

[6] The government offers no reason, nor is there any, why preservation of the veto power accorded the Secretary of HHS under the permanent scheduling provisions would impair Congress's interest in expediting the temporary process. The government's suggestion that the Attorney General is best situated to make the temporary determination (Resp. Br. 28), moreover, ignores the fact that one of the three criteria set out by Congress—*i.e.*, "[w]hat, if any, risk there is to public health," 21 U.S.C. § 811(h)(3)—is expressly committed to the Secretary's determination under the permanent provisions, 21 U.S.C. § 811(b).

judicial review is to deny that it really is a preclusion. The government says, first, that review is available at the end of a *permanent* listing proceeding—so that review is not denied but merely "postpone[d]." Resp. Br. 32-33. It then says that, in any event, review is available as a defense to a criminal prosecution. *Id.* at 34-36. Having made that two-part argument, the government finally argues that the Constitution is satisfied. *Id.* at 36-39. All of these arguments are incorrect.

a. The government contends that section 811(h)(6) "is simply designed to postpone suits challenging the listing decision until the administrative process has run its course" through the completion of the permanent scheduling process. Resp. Br. 33. That argument mischaracterizes the statutory scheme. A temporary scheduling decision is not simply the first step in a permanent scheduling process that inexorably leads to a judicially reviewable order. On the contrary, a temporary order has full force and effect regardless of whether the government subsequently initiates a permanent scheduling proceeding. There is thus no guarantee of any judicial review. Much less is there any statutory directive to proceed with a permanent scheduling decision under any meaningful time constraint: the temporary order is designed to last for a full year without any additional governmental action. And, as far as the statute indicates, an individual can be convicted and sentenced to up to life in prison based on a temporary scheduling order, his conviction need not be set aside if the drug at issue is not permanently scheduled, and his sentence need not be changed if the drug is permanently placed on a schedule that differs from its placement on Schedule I (the only allowed placement) under the temporary provisions. Hence, section 811(h)(6) does not merely "postpone" review.

The government's attempt to analogize section 811(h)(6) to two statutory provisions that allow a proposed agency rule to take immediate effect without an opportunity for judicial review (Resp. Br. 33 n.29) merely highlights how seriously the government has mischaracterized the present scheme. Both of those statutory provisions, 15 U.S.C. § 2605(d)(2) and 21 U.S.C. § 360f(b), permit emergency orders only as a part of an administrative process that *must* produce a final, judicially reviewable order; and both expressly provide that, if an emergency order is issued, the agency must immediately expedite the process of final decision. No such guarantee of a swift or certain opportunity for judicial review is provided by section 811(h).

b. The government also asserts that judicial review of the Attorney General's compliance with the statutory standards in scheduling a particular drug is available as a defense to a criminal prosecution. Remarkably, the government has never before squarely taken this position.[7]

---

[7] Nor has it ever before suggested, as it now tentatively does, that "it is questionable whether petitioners have standing" or that their convictions could be reversed only if section 811(h)(6) "were deemed non-severable from the remainder of the subsection." Resp. Br. 34 n.30. These offerings are misguided. Petitioners were convicted pursuant to a regulation that they argue was invalid because Congress did not properly delegate rulemaking power to the Attorney General. If we are correct in that argument, the Attorney General had no rulemaking power to exercise and his temporary scheduling regulations were thus void. Severing the invalid portion of the temporary scheduling statute *now*, moreover, cannot legitimate *prior* scheduling orders that were adopted when the disciplinary effect of the required structural protections were not in place.

In any event, the *sole* authority that the government cites for its position is 28 U.S.C. § 2111, the codification of the harmless error rule. But since no harmless error claim was raised below, it should not be considered here. *See, e.g., United States v. Giovannetti*, 1991 U.S. App. Lexis 4509 (7th Cir. Mar. 21, 1991). Moreover, as this Court has previously recognized, the possibility of severance does not defeat standing to challenge the constitutional validity of a statute. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (finding invalid provisions severable *after* consideration of merits); *United States v. Jackson*, 390 U.S. 570, 585-91 (1968) (same). There is, accordingly, no reason the severability question should

In any event, the position is untenable given the plain language of section 811(h)(6), which unqualifiedly states that "[a]n order issued under paragraph (1) [*i.e.*, a temporary scheduling order] is not subject to judicial review." Thus, "[w]hat the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court." *West Virginia Univ. Hosp., Inc. v. Casey*, 59 U.S.L.W. 4180, 4185 (U.S. Mar. 19, 1991) (quoting *Iselin* v. *United States*, 270 U.S. 245, 250-51 (1926)). By contrast, none of the cases cited by the government (Resp. Br. 35 nn. 32 & 33, 36 n.35) involved statutes with language prohibiting judicial review in terms nearly as clear as the language of section 811(h).[8]

---

not be deemed waived where, as here, the government has failed to raise it in the courts below.

[8] Indeed, of the four decisions cited in note 32, only one even involved a provision that limited judicial review, *Estep v. United States*, 327 U.S. 114, 119 (1946). And in that case (cited again at Resp. Br. 36 n.35), the preclusive language merely provided that a military induction order was "final." Such language, which is sometimes a *prerequisite* to judicial review, hardly forms the basis for denying review of a defense to a criminal prosecution. 327 U.S. at 119.

Of the cases cited in note 33—one of which finds that review *was* barred, *Califano v. Sanders*, 430 U.S. 99 (1977)—none involved preclusive language that, like section 811(h), completely denied any form of judicial review. Thus, the more limited preclusive provisions in those cases were reasonably construed not to cover the particular order or claim at issue. For example, *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), and *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), both held that a limitation on review of individualized agency determinations did not bar collateral constitutional or statutory challenges to systemic practices or policies. *See* Pet. Br. 27. Similarly, *Johnson v. Robison*, 415 U.S. 361 (1974), held that a constitutional challenge to a statute was not barred by a provision limiting review of an agency's individual benefits determinations. And *Dunlop v. Bachowski*, 421 U.S. 560 (1975), involved a provision that did not refer to judicial review at all.

Finally, the two cases cited by the government in note 35—which the government itself characterizes as involving ambiguous statutes

c. The government also argues that the preclusion of pre-prosecution judicial review is constitutionally permissible. But the government cannot cite a single precedent that upholds such preclusion with respect to a criminally enforceable rule. Instead, the government relies principally on *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), a case that involved only *civil* seizure actions implicating *property* rights—a point the Court took pains to emphasize (*id.* at 599). Moreover, this Court has already rejected the government's previous reliance on *Ewing* in circumstances essentially identical to those presented here. Thus, in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 147 (1967), the Court explained that "[t]o equate a finding of probable cause for proceeding against a particular drug manufacturer [which was involved in *Ewing*] with the promulgation of a self-operative, industry-wide regulation," was misguided. Indeed, "the determination of probable cause in *Ewing* has 'no effect in and of itself,' 339 U.S. at 598; only some action consequent upon such a finding would give it life." *Abbott Laboratories*, 387 U.S. at 147 (quoting *Ewing*).

The government also relies on *Clark v. Gabriel*, 393 U.S. 256 (1968), but that decision likewise explicitly noted that pre-prosecution judicial review *was* available if an inductee accepted induction and filed a habeas corpus petition. The government stresses that *Clark* required

---

(Resp. Br. 36 n.35)—offer no greater support to the government's attempt to rewrite section 811(h)'s unambiguous ban on judicial review. We have discussed *Estep* above. And *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), merely held that a criminal defendant charged with violating an agency order was entitled to a judicial ruling on the complex question whether it was the type of order (a proper "emission standard") that was covered by the provision barring judicial review of certain agency orders in criminal prosecutions. Here, by contrast, there is no dispute that the temporary scheduling order is the type of order covered by section 811(h)'s bar on judicial review. *Adamo* also provided for pre-prosecution direct judicial review, which is not available here.

compliance with an order without immediate judicial review, but that is not what is at issue here: if an individual complies with a temporary scheduling order under section 811(h), there is no way to secure judicial review, period.[9] Unlike in *Clark*, therefore, the only way to get judicial review of a temporary order under the government's view is to risk criminal liability.

d. Ironically, the government's brief itself indicates that the need for judicial review is by no means a theoretical concern here. Thus, the government disputes our assertion that section 811(h) was intended only to apply to "newly designed or created" drugs. Resp. Br. 12 n.16 (quoting Pet. Br. 6 n.3). Yet, in invoking its temporary scheduling authority, the government has often quoted a passage in the House Report making precisely the same point that we did: "This new procedure [emergency scheduling] is intended by the Committee to apply to what has been called 'designer drugs,' *new* chemical analogs or variations of existing controlled substances, or other *new* substances." 52 Fed. Reg. 30,174 (Aug. 13, 1987) (notice regarding temporary scheduling of 4-methylaminorex) (emphasis added) (quoting H.R. Rep. No. 835, 98th Cong., 2d Sess. (1984)). Thus, contrary to the government's repeated suggestions (*e.g.*, Resp. Br. 34 n.30), there *is* a question as to whether 4-methylaminorex, even if subject to permanent scheduling, could have been properly scheduled temporarily, because it was hardly a new drug in 1987. *See* Pet. Br. 6 n.3.

The government likewise has changed its position on what criteria must be met for a drug to be scheduled under section 811(h). In its most recent brief, the gov-

[9] As we noted in our opening brief (Pet. Br. 34), Congress might well be able to make a scheduling order immediately effective while judicial review was being sought, but it has not done so. In *Clark*, of course, the government had a compelling interest in securing immediate compliance with military induction orders prior to judicial review.

ernment says that, in addition to the criteria set out in section 811(h)(3), temporary scheduling decisions must conform with the Schedule I criteria in 21 U.S.C. § 812(b)(1). Resp. Br. 5 & n.4. In the court of appeals, however, the government made no reference to 21 U.S.C. § 812(b)(1), arguing instead that "the statutory list of considerations in subsection (h)(3) is sufficient to satisfy constitutional requirements." Appellee's Br. 10 & n.3. Thus, it would appear that not even the government is sure about which criteria the Attorney General must satisfy if he is to criminalize a drug. To clarify such questions, and to hold the Attorney General to the proper standard, is precisely the function of judicial review. *Compare Grinspoon v. DEA*, 828 F.2d 881, 889 (1st Cir. 1987) (clarifying criteria for permanent scheduling).

4. *Subdelegation Is Prohibited.* The government contends that the language of 28 U.S.C. § 510 and 21 U.S.C. § 871(a) is broad enough to permit the Attorney General to delegate his crime-defining authority to any "officer" or "employee" and, therefore, to the DEA Administrator. We agree that the language, on its face, is sufficient for that purpose. But the language must be read in light of the nature of the power being delegated.

The power at issue here is beyond doubt of a constitutionally extraordinary character. Given its novelty in 1984, the power plainly was not within the contemplation of the Congress that, years earlier, had enacted 28 U.S.C. § 510 and 21 U.S.C. § 871(a). In these circumstances, the Court should hold the power non-delegable by the Attorney General. Indeed, the argument for such a result is not only that Congress should be more explicit before allowing any "employee" of the Justice Department to define crimes, but also that the Court could thereby avoid a direct and definitive ruling on the constitutional questions. See, *e.g.*, *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (construing statute not

to be retroactive in light of "substantial doubt" about constitutionality of retroactive statute).

CONCLUSION

The judgments against petitioners should be reversed.

Respectfully submitted,

DANIEL L. MEYERS
351 Broadway
Second Floor
New York, New York 10013
(212) 226-4106

MICHAEL E. DEUTSCH
PEOPLE'S LAW OFFICE
1180 North Milwaukee
Chicago, Illinois 60622
(312) 235-0070

JOEL I. KLEIN *
RICHARD G. TARANTO
ROBERT H. TILLER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184
Counsel for Petitioners

* Counsel of Record